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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA – LAS VEGAS

BRADLEY STEPHEN COHEN, an individual; and COHEN ASSET MANAGEMENT, INC., a California corporation,
Plaintiffs,
vs.
ROSS B. HANSEN; NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company; and STEVEN EARL FIREBAUGH,
Defendants.

Case No. 2:12-cv-01401-JCM-PAL

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Ross B. Hansen, Northwest Territorial Mint, LLC, and Steven Earl Firebaugh, through counsel, hereby move for summary judgment as follows. Defendants' motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure and based on the following memorandum of law, the attached depositions, declarations and exhibits, the documents on file with the Court in this matter, and any oral argument the Court may allow.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This lawsuit is about the fundamental right to free speech, and one individual's desire to stifle those rights due to his personal dissatisfaction with the Defendants' message. Plaintiffs Bradley S. Cohen ("Cohen") and his company, Cohen Asset Management, Inc. ("CAM"), (collectively "Plaintiffs") brought a complaint for defamation and other claims based on statements found on an anonymous website created primarily by Defendant Ross Hansen criticizing Cohen and CAM. All Defendants have done is exercise their constitutional rights to relay unpleasant experiences with Plaintiffs, and share their concerns regarding Plaintiffs' business practices with the public. In response, Plaintiffs filed this action, suing Defendants for the entire contents of the websites. Plaintiffs predicate this litigation on the presumption of reputational damages that, after discovery, cannot be credibly proven or found. Defendants seek to resolve the pending claims against them with judgment in their favor.

II. Statement of Facts

A. The Parties

1. Defendants

Defendant Northwest Territorial Mint ("NWTM"), a Washington-based company, is the largest private mint operation in the United States with more than 300 full-time employees. It primarily manufactures items made from precious metals and services institutions, corporations, and individuals in the United States and around the world, including the United States military and various United States government agencies. Defendant Ross Hansen is the owner and chief executive officer of Northwest Territorial Mint. Defendant Steven Firebaugh is a web designer and web manager employed by Northwest Territorial Mint.[1]

[1] Collectively, these three individual defendants are referred to as the "Defendants."

2. **Plaintiffs**

Plaintiff Bradley Cohen is a well-known real estate investor based in Los Angeles. (ECF 40 at 5 ¶ 13).[2] Cohen is the president and chief executive officer of Cohen Asset Management, Incorporated ("CAM"), a California-based company. CAM is an operator of real estate, which acquires property on behalf of investors, runs the property and provides returns to those investors. (See Deposition of Scott McGinness at 16:11-14). Cohen Asset Management creates a number of affiliated entities to manage the various properties. (*Id.* at 23:11-23).

As head of a large real estate investment company, Plaintiff Cohen is, by his own admission, a limited-purpose public figure (ECF 40 ¶¶ 1-2). Bradley Cohen is a well-known and active member of the Los Angeles community and the national real estate community. Plaintiff frequently appears as a guest speaker at several national and even international real estate conferences and events and has been honored by such organizations such as Boy Scouts of America, Cedars Sinai Medical Center, and Friends of the Israeli Defense Forces. (ECF 40 ¶ 13). He has received numerous awards and recognitions from local, state, and national government officials, including President George W. Bush and Vice-President Al Gore (Exhibit A). Cohen has also spoken at numerous real estate investing conferences in the last five years. (Cohen Dep. at 33; Exhibit B).

B. **The Auburn Valley Industrial Capital LLC v. Northwest Territorial Mint Litigation**

Defendants' relationship with Plaintiffs began when Northwest Territorial Mint leased property from an affiliate of CAM, Auburn Valley Industrial Capital, LLC ("AVIC"). (ECF 40 ¶ 28). The parties' relationship terminated when AVIC sued Defendants, alleging lease violations (ECF 40 ¶ 31). In the lawsuit, AVIC claimed that Defendants had environmentally contaminated the property they leased, and Plaintiffs were granted a judgment in the amount of $869,746.53.

[2] As Mr. Cohen verified the contents of the Complaint under oath (ECF 40 at 40), its factual assertions may be construed as party statements and thus admissible.

(ECF 40 ¶ 31). AVIC's damages, and award of attorneys' fees against NWTM, are currently on appeal. (ECF 40 ¶ 31).

After the termination of the lessor/lessee relationship, Hansen created websites about Bradley Cohen and CAM (Hansen Dep. at 31:13-21), and Plaintiffs filed this lawsuit in August 2012. (ECF 1)

C. **Defendants' Use of the Websites**

In 2012, Hansen developed two websites that feature information and opinions about Plaintiffs (the "Websites"), including asking the hyperbolic question of whether Cohen is "the next Bernie Madoff." (*See* Front Page of <bradleyscohen.com>, Exhibit C at 1; *see* ECF 40-1; Cohen Dep. at 179) The website, formerly located at <bradley-cohen.com> (Exhibit D; Cohen Dep. at 151:20-152:12) and currently located at <bradleyscohen.com> (Exhibit C), feature Hansen's opinions about Plaintiffs and their business practices. (*See* Deposition of Ross B. Hansen at 43) Plaintiffs published information on the Websites based upon Hansen and NWTM's experiences with CAM and Cohen, conversations Hansen had with CAM's employees, and documents Hansen had found through Internet searches. (Hansen Dep. at 85:19-86:7).

Hansen's primary purpose in publishing the websites was to inform the public about potential unethical acts he encountered as part of a "public service" to the community. (Hansen Dep. at 34:12-24) While Hansen did not author all of the content, he was the one who gave final approval of what would be published. (Hansen Dep. at 131:4-132:19). Defendant Steven Firebaugh's involvement in the website was "minimal." (Hansen Dep. at 132:25-133:2).

On or about May 2, 2012, the registrar of <bradley-cohen.com> shut down the website. (ECF 40 ¶ 50). However, <bradleyscohen.com> is still operational. (ECF 40 ¶ 9).

D. **Damages**

Despite filing their First Amended Complaint, Plaintiffs have not alleged actual damages from the operation of the websites. (*See* Exhibit E at 2-5; Exhibit F at 2-6). According to Plaintiffs' First Amended Complaint, Cohen Asset Management and its affiliated entities have industrial and office properties nationally, with a current estimated value of "several hundred million dollars." (ECF 40 ¶ 13). Throughout the course of this litigation, Plaintiffs have been unable to assert any

demonstrable loss of income or other loss of business resulting from the content of Defendants' websites. (McGinness Dep. at 63; Cohen Dep. at 114:6-15; Plaintiffs' Responses to Interrogatories) In 2013, CAM's investments have a higher value than they did five years ago, it has investments in more property than it did five years ago, and more of CAM's employees in 2013 have a salary of more than $150,000 than five years prior. (McGinness Dep. at 47:9-21, 49:11-50:17; Exhibit G). Plaintiffs are on track to have a profitable 2013 – even more profitable than 2012 when the Websites came into existence (McGinness Dep. at 99:7-100:7; ECF 40 ¶ 9; Hansen Dep. at 31:13-21) – and perhaps CAM's most profitable year ever.

Although Plaintiff Cohen claims that the websites have caused him emotional distress (ECF 40 ¶ 77), Cohen continues to remain active in his community and is in even better physical condition. Most recently, Cohen has lost weight after the publication of the websites, a change that his close friend described as "positive" and attributes to working out. (See Deposition of Steven Fishman at 38:21-39:4). Financially, Cohen and CAM are both doing well. (*Id.* at 80). Meanwhile, Cohen claims to this Court that he has been harmed by this website. Cohen's claims are baseless.

III. Legal Standard

A party is entitled to summary judgment as a matter of law upon demonstrating that there is no genuine issue as to any material fact proving – or disproving – a plaintiff's claim. *See* Fed. R. Civ. P 56(c); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Conclusory or speculative testimony is insufficient to raise a genuine issue of material fact. *Thornhill Publishing Co., Inc. v. GTE Corp*., 594 F.2d 730, 738 (9th Cir. 1979). When the non-movant must prove a claim at trial, the moving party may satisfy its burden by demonstrating the absence of evidence necessary to support or establish the non-movant's claim. *Celotex*, 477 U.S. at 325. In contrast, claims or affirmative defenses must be proven by admissible and affirmative evidence. *See Id*.

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment for the movant is proper.

Id. at 249. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. at 248. Courts favor the early resolution of disputes based on defamation, as the suit "may be as chilling to the exercise of First Amendment freedoms as the outcome of the lawsuit itself." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

IV. Argument

A. California Law, Rather than Nevada Law, Governs Plaintiffs' Claims

A federal court sitting in diversity must apply the law of the forum state, including its choice of law provisions. *Klaxon v. Stentor Elect. Mfg., Inc*., 313 U.S. 487, 496 (1941); *Fisher v. Prof'l Compounding Ctrs. of Am., Inc*., 311 F. Supp. 2d 1008, 1015 (D. Nev. 2004). As this action is based on diversity jurisdiction (ECF 40 ¶¶ 6-8), the Court must look to a more specific section of the Restatement (Second) of Conflict of Laws before applying the "most significant relationship" test. *Dictor v. Creative Mgmt. Servs., LLC*, 223 P.3d 332 (Nev. 2010). Restatement (Second) of Conflict of Laws § 150 addresses the issue of multistate defamation:

> (2) When a natural person claims that he has been defamed by an aggregate communication, **the state of most significant relationship will usually be the state where the person was domiciled at the time**, if the matter complained of was published in that state.
>
> (3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, **the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business** at the time, if the matter complained of was published in that state.

Restatement (Second) of Conflict of Laws § 150(2), (3) (emphasis added). The Nevada Supreme Court has indicated that "more specific sections" of the Restatement (Second) of Conflict of Laws should be the "starting point of a choice-of-law analysis." *Dictor*, 223 P.3d at 335 (applying Missouri law to tort action pending in Nevada). Here, both Plaintiffs claim to have been defamed by statements published on the Internet and accessible globally. As these statements have been seen within California (*see, e.g.*, Fishman Dep. at 13:16-14:22; Cohen Dep. at 108:12-109:2; Stern

Dep. at 7:19-24, 25:8-15), they have been published within that state. Both Cohen and CAM were domiciled in the Central District of California and remain domiciled there (ECF 40 ¶¶ 1-2). The reasoning of Restatement (Second) of Conflict of Laws § 150 is the most specific law to follow in analyzing this situation. Nevada law recognizes that "the place of the wrong is recognized as the place where the injury is incurred." *Truck Ins. Exchange v. Tetzlaff*, 683 F. Supp. 223, 225 (D. Nev. 1988), *citing Lexalt v. McClatchy*, 116 F.R.D. 438, 447 (D. Nev. 1987).

Plaintiffs' alleged harms have been most directly experienced within California, where they reside and conduct the business activities that they claim Defendants have significantly harmed. Even if Plaintiffs suffered some quantum of damage elsewhere, the majority of their damages from alleged Internet defamation would be suffered within their state of domicile. Restatement (Second) of Conflict of Laws § 150 recognizes this reality of interstate defamation and identifies the state of a plaintiff's domicile as the state with the most significant relationship to the underlying tort, and therefore the state whose law should apply.

In this instance, the Restatement (Second) of Conflict of Laws' analysis leads to the conclusion that California law controls this dispute. All of Plaintiffs' claims arise from state law (*see* ECF 40 at 23-25). In conjunction with the other factors discussed in this brief, Nevada's choice-of-law jurisprudence requires the application of California law to this dispute. However, whether evaluated under Nevada or California law, Defendants' remain entitled to the Court's entry of judgment in their favor as set forth below.

B. Plaintiffs Have Not Established Any Actual Damages, Thus Judgment Is Proper For Defendants on All Claims Requiring Them.

Plaintiffs proudly take the position in this litigation that they "are not seeking, nor have [they] identified" actual damages in this litigation (Exhibit E at 3-4, 5:2-4; Exhibit F at 3-4, 5:26-6:2). This admission alone is sufficient to enter judgment in Defendants' favor on many of Plaintiffs' claims. To the extent Plaintiffs' claims seek damages for defamation (and not defamation *per se*) under Nevada law, Plaintiffs are required to show actual damages. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1194, 866 P.2d 274, 283-84 (1993) ("in an ordinary [defamation] action, before any recovery will be allowed the plaintiff," special damages must be

proven, which "are quantifiable monetary losses that flow directly from the injury to reputation caused by the defamation, e.g. loss of business"); *see Talbot v. Mack*, 41 Nev. 245, 275, 169 P.2d 25, 34 (1917). Plaintiffs' admission that they neither possess nor know of any such damages precludes them from pursuing any claim for defamation that is not defamation *per se*.

Plaintiffs must also have evidence of actual harm to prevail on a claim for intentional interference with expected future business. *Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P.2d 727, 729-30 (1993); *Leavitt v. Leisure Sports, Inc*., 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987); *Westside Ctr. Assocs. v. Safeway Stores 23, Inc*., 42 Cal. App. 4th 507, 521-22 (Cal. Ct. App. 1996). Similarly, since Plaintiffs' theory of Defendants' false light invasion of privacy is based on statements that are not defamatory on their face, California law requires Plaintiffs to produce evidence of actual damages. *Fellows v. Nat'l Enquirer*, 42 Cal. 3d 234, 251 (Cal. 1986). Having failed to do so, the Court may enter judgment in Defendants' favor on this claim as well.

C. **Plaintiffs Cannot Hold Defendants Liable for Defamation**

Plaintiffs' case chiefly sounds in defamation. To prevail on this claim, Plaintiffs must prove Defendants 1) made a false and defamatory statement concerning the plaintiff(s), 2) Defendants made the false and defamatory statement to a third party, 3) Defendants' actions were at least negligent; and 4) Plaintiffs suffered actual or presumed damages. *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002); *Sanders v. Walsh*, 219 Cal.App.4th 855, 862 (Cal. Ct. App. 2013) ("the sine qua non of recovery for defamation … is the existence of falsehood") (internal citations omitted); *see also Gertz v. Robert Welch, Inc*. 418 U.S. 323, 350 (1974) (requiring a showing of at least negligence for defamation liability). To prevail on this claim, Plaintiffs must prove Defendants published a false statement of fact, and that it caused damage – real or presumed – to Plaintiffs.

1. Plaintiffs are Limited-Purpose Public Figures, and Cannot Meet the Standard of Showing Defendants Acted with Actual Malice

Cohen's stature and reach in the real estate investing community is sufficient to make him a limited-purpose public figure.[3] Individuals whose lives are sufficiently public, and whose actions are significant to the public at large or a significant subset of it, are subject to higher standards for proving defamation. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Specifically, a public figure must prove defendants acted with "actual malice" to recover for defamation. *Id*. To meet this standard, a plaintiff must prove by clear and convincing evidence that a defendant's allegedly defamatory statement was made with knowledge that it was false, or reckless disregard for the truth. *Id*.; *see Ampex Corp. v. Cargle*, 27 Cal. Rptr. 863, 870 (Cal. Ct. App. 2005); *Nev. Ind. Broadcasting Corp. v. Allen*, 99 Nev. 404, 414, 664 P.2d 337, 334 (1983).[4]

i. Nevada Law

Nevada law has followed the standard enunciated in *Gertz* and looked to a plaintiff's participation in a public controversy. *Pegasus*, 118 Nev. at 719-721. Nevada's Supreme Court has found that a restaurant, which inserts itself into the public to conduct business, is a limited-purpose public figure for the purpose of the business it conducts. *Id*. Cohen, the namesake and CEO of his firm, and CAM, rely on the public to carry on their business and even welcome individual investors (Cohen Dep. at 161:10-21; McGinness Dep. at 39:24-40:4, 71:12-19; Fishman Dep. at 103:12-104:1). In the past, Cohen has hardly shied away from receiving public recognition for his accomplishments and involvement within the community (Exhibit A; Reha Dep. at 20:16-25:15). By entering the stream of commerce and offering its investment services to qualifying members of the public, CAM – and Cohen, its public face – have become public figures under Nevada law.

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[3] A limited purpose public figure is subject to the same standard of proof as a general public figure, and attains such status by "voluntarily inject[ing] himself or [being] drawn into a particular public controversy and thereby becom[ing] a public figure for a limited range of issues." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 345 (1974).

[4] Because of the nuances in this analysis under Nevada and California law, Defendants have addressed both. While California law governs this dispute, the current ambiguity on this issue compels Defendants to demonstrate the insufficiency of Plaintiff's claims under both states' laws.

ii. California Law

California law employs a three-part test to determine whether a plaintiff is a public figure. This test requires three elements to be met: 1) the existence of a public figure; 2) the plaintiff undertakes a voluntary act through which he or she sought to influence resolution of the public issue; and 3) the alleged defamation is germane to the plaintiff's participation in the public controversy. *Ampex*, 27 Cal. Rptr. 3d at 870; *accord Makaeff v. Trump Univ., LLC*, 2010 WL 3341638, at *4 (S.D. Cal. Aug. 23, 2010).

a. A Public Controversy Exists Over Private Investment Funds

Ever since the recession beginning in 2008, private investment vehicles have received increased scrutiny from the public. This controversy has been underscored by the collapse of once-reputable investment firms led by Bernard Madoff and Alan Stanford. The ongoing crisis of confidence is a public controversy that implicates firms such as CAM and the individuals who run them, such as Cohen. Because of the misdeeds that were perpetrated by Madoff and Stanford individually that led to the collapse of their unlawfully operated investment firms, the principal of such an investment firm is indivisible from the firm itself in the context of this controversy. Where the financial health and integrity of institutions whose resources are available to the public are in question, California's courts have found the concerns constitute a public controversy. *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 524 (Cal. Ct. App. 2006).

b. Plaintiffs Have Participated Within the Public Controversy

Plaintiffs have been active within the investment community and attempted to reach others regarding the public's skepticism over private investing.[5] This conduct – and at minimum Plaintiffs' being pulled into the vortex of public controversy over financial institutions – is sufficient to make Plaintiffs public figures. *Denney v. Lawrence*, 22 Cal. App. 4th 927, 933 (Cal. Ct. App. 1994); *Mosesian v. McClatchy Newspapers*, 233 Cal.App.3d 1685, 1689 (Cal. Ct. App.

[5] Even independent of this, Cohen has been publicly recognized for his contributions (Exhibit A).

1991).[6] CAM has been a member of the Pension Real Estate Association and National Association of Real Estate Investment Managers (NAREIM), and Cohen has been a member of NAREIM's board (Cohen Dep. at 36:22-37:3, 78:8-12; Exhibit B). Cohen has traveled across the country to speak at NAREIM events about real estate investing, and has even traveled to France on NAREIM's behalf (Cohen Dep. at 79:25-80:2). Even if CAM and Cohen had not actively participated in NAREIM and reached out to the group's constituents, precedent supports them being included in the controversy by virtue of their participation in a publicly scrutinized industry.

c. Defendants' Allegedly Defamatory Statements Relate to Plaintiffs' Participation in the Public Controversy

Defendants' statements on the Websites squarely address Cohen and CAM's participation in the ongoing public controversy over financial investing. Specifically, Defendants' Websites raise questions regarding the similarities between Plaintiffs' conduct and Bernie Madoff's (Exhibit C at 1-2; Exhibit D at 1-2). Defendants' statements also identify questions about the performance of Plaintiffs' investments for their owners, and question how investors can protect themselves – and their capital – based on the limited information available to them. As required under California law, these statements go to the heart of Plaintiffs' "participation in the [public] controversy." *Ampex*, 128 Cal.App.4th at 1577. Defendants' statements fit squarely within the nexus of the extant public controversy over private investment and Plaintiffs' participation in that controversial industry.

2. Defendants' Statements are Matters of Opinion and Therefore not Defamatory

Defamation is a tort for remediating false statements of fact, but it does not reach into the realm of opinions and ideas. "There is no such thing as a false idea," as "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-340. Statements of mere opinion are not

[6] When a plaintiff's conduct makes it impossible for him or her to avoid being included in the controversy, even when he or she does not seek to be part of it, he or she may become an involuntary limited-purpose public figure. *See Dameron v. Washington Magazine*, 779 F.2d 736, 741 (D.C. Cir. 1985).

actionable. *Pegasus*, 118 Nev. at 714; *Nev. Ind. Broadcasting Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 342 (1983). The determination of whether a statement is fact or opinion is a question of law. *Dworkin v. Hustler Magazine, Inc*., 867 F.2d 1188, 1193 (9th Cir. 1989).

The United States Court of Appeals for the Ninth Circuit uses a three-part test to determine whether a statement contains or implies a provable factual assertion. *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366 (9th Cir. 1995). This test evaluates 1) whether in the broad context the general tenor of the entire work, including the subject of the statements, the setting, and the format, negates the impression that Defendants were asserting objective facts, 2) whether the context and content of the specific statements, including the use of figurative and hyperbolic language, and reasonable expectations of the audience, negate that impression, and 3) whether the statement is sufficiently factual to be provable as false. *Id*.; *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009). Under these factors, the Defendants' statements are not actionable as defamation.

i. Viewed Within Their Proper Context, Defendants' Websites Would Be Interpreted as Non-Defamatory Opinion

Allegedly defamatory statements must be read within the context they were made to ascertain their true meaning. *Pegasus*, 118 Nev. at 715. The "circumstances of communication" may constitute a defense to an action for defamation. *Simpson v. Mars, Inc*., 113 Nev. 188, 191-92, 929 P.2d 966, 970 (1997). The test for determining whether a statement is one of fact or opinion is "whether a **reasonable** person would be likely to understand the remark as an expression of the source's opinion or a statement of fact." *Allen*, 99 Nev. at 410 (emphasis added).[7]

Context is crucial in evaluating defamation claims – the entirety of the speech's surroundings may turn a statement that appears out of context to be factual into a statement of opinion. *Pegasus*, 118 Nev. at 717 (finding a statement that a restaurant's food came from a package expressed a non-defamatory opinion, even if not factually accurate). The "low barrier to speaking online allows anyone with an Internet connection to publish his thoughts," free from

[7] Certain statements may also be "mixed" and include both law and fact. *Allen*, 99 Nev. at 411. However, as set forth below within the motion, statements requiring knowledge of underlying facts are proven to be true, and may therefore be adjudicated non-defamatory. *See Id*.

"editorial constraints" of traditional media leads to readers according less deference to allegedly defamatory remarks found on the Internet. *Sandals Resorts Int'l, Ltd. v. Google, Inc*., 925 N.Y.S.2d 407, 415-16 (N.Y. App. Div. 2011). The use of "loose, figurative, or hyperbolic language" endemic of the Internet and other forms of unedited communication negate the impression that a speaker seriously accused a plaintiff of wrongdoing or criminal conduct. *Martino*, 563 F.3d at 989-990, *citing Milkovich v. Lorain Journal Co*., 497 U.S. 1, 4-5 (1991).

Indeed, the fact that the Websites express negative views of Cohen and his company, CAM, would make a reasonable person suspicious as to whether they contain statements of fact. *See Martino,* 563 F.3d at 989-990; *Obsidian Fin. Group, LLC v. Cox*, 812 F. Supp. 2d 1220, 1232 (D. Ore. 2011). Moreover, the fact that the Websites and their domain names were registered and hosted anonymously – even outside of the United States (Firebaugh Dep. at 40:5-41:14; Hansen Dep. at 160:6-9; ECF 40 ¶¶ 56-57) – further indicates that they contain opinions critical of Cohen and CAM, and are in no way affiliated with Plaintiffs or any other trusted entity for information about real estate investing. *See id*. Even without these factors, statements published on a blog that accepts comments, such as the Websites at issue in this litigation, are inherently less likely to be viewed as statements of fact. *Art of Living Found. v. Does 1-10*, Case No. 10-cv-5022 *2011 WL 2442441898* at *7 (N.D. Cal. June 15, 2011); *see Cox*, 802 F. Supp. 2d at 1223-24 (collecting citations regarding a reasonable person's reaction to alleged defamation over the Internet).

a. Comparisons to Bernard Madoff Are Not Automatically Defamatory and Constitute Statements of Opinion

Plaintiffs are not the first parties to claim defamation upon their practices being compared to those of Bernard Madoff. In the past, these comparisons have been dismissed as non-defamatory. The same is true of this case.

Defendants' statements regarding Bernard Madoff are relatively limited, and much of the Websites' content focuses on the conduct of Cohen and CAM individually. The comparisons that are drawn between Plaintiffs and Madoff focus on specific facts regarding the activities of both: That Madoff and Cohen were both members of various boards of directors, that they made political

contributions, that they both worked in the investment field, and that they were both the eponymous heads of their respective investment firms (Exhibit C at 1-2; Exhibit D at 1-2).

Comparison of these discrete similarities is not defamatory. *Medifast, Inc. v. Minkow*, Case No. 10-cv-382, *2011 U.S. Dist. LEXIS 33412* at *39 *2011 WL 1157625* (S.D. Cal. Mar. 29, 2011). In *Minkow*, the United States District Court for the Southern District of California held that comparing a compensation plan to "Madoff's secret trading system," creating "points of similarity between Madoff and Medifast," and observing that both Medifast and Madoff used small accounting firms, was not defamatory. *Id*. at *39-40. As in *Minkow*, Defendants in this case have not accused Plaintiffs of running a Ponzi scheme "simply by using '[Plaintiffs' names]' and 'Madoff' in the same breath." *Id*. The Southern District of California explained:

> [T]he context of Defendants' statements shows that they used Madoff as a contemporary cautionary tale… If any statement of fact can be implied from Defendants' statements, it is this: Things at Medifast are not what they seem. Such a statement is too inexact or subjective to support a libel per se claim; no reasonable person could construe it to be provably false. *Id*.

Similarly, the Delaware Court of Chancery held the invocation of Madoff's name when describing a management firm's refusal to provide information about a fund's investments, was not defamatory – the conduct alleged to be defamatory is, in fact, exactly what Madoff did. *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, Case No. 5502-CS *2011 Del. Ch. LEXIS 116* at *147-150 *2011 WL 3505355* (Del. Chan. Ct. May 25, 2011); s*ee Gilbrook v. City of Westminster*, 177 F.3d 839, 863 (9th Cir 1999) (holding that comparison of union leader to Jimmy Hoffa was not defamatory). Contrary to Plaintiffs' claims, Defendants' comparison of them to Madoff is not defamatory – least of all using the point-by-point factual comparisons that Defendants employed. *See Minkow*, *2011 WL 1157625*. As in the *Minkow* case, Defendants' message is one of skepticism; it is not an allegation of criminality, nor would a reasonable person interpret it as such.

b. Statements Describing Cohen and CAM are Statements of Opinion

The more prone a statement is to being proven true or false, the more likely it is to be a statement of fact, rather than opinion. *Cox*, 812 F. Supp. 2d at 1233. However, even statements

that may be actionable when read in isolation become statements of opinion when placed into their proper context. *Id.*; *Art of Living*, *2011 WL 2441898* at *7. Accusations of criminal activity including lying, pimping, embezzlement, fraud, and abuse, can be statements of opinion, rather than fact, when viewed within their native contexts. *Gardner*, 563 F.3d at 988; *Knievel v. ESPN*, 393 F.3d 1068, 1078 (9th Cir. 2005) (holding accusation that plaintiff was a "pimp" was not actionable); *Pegasus*, 118 Nev. at 717 (holding claim that food was packaged and derived from canned items non-defamatory); *Art of Living*, *2011 WL 2441898* at *7. Indeed, a number of Defendants' statements on the Websites, such as "Cohen's financial status appears to be declining" are transparent statements of the writer's impression of Cohen.

Many of the statements on the Websites are subjective and incapable of possessing an objective, non-falsifiable meaning. The Defendants' statements that Cohen leads a life of "glamour" and "luxury" invokes terms that defy uniform interpretation (Exhibit C at 1-3, 12; Exhibit D at 1-3, 8, 11). Describing Cohen's home as a "mansion," (Exhibit C at 12; Exhibit D at 11) or CAM's network of relationships between and among affiliated companies that include joint ventures and individual LLCs as "intricate," (*see, e.g.*, Exhibit C at 2, 6, 7, 14; Exhibit D at 7, 9, 10, 17) is a matter of subjective interpretation. Cohen himself admitted that the complexity of CAM's relationships with affiliated entities lies in the eye of the beholder: while he found the relationships simple to understand, he admits that he did not know someone with a high school education would have trouble understanding the business' operations, and implied that real estate training was necessary to understand the transaction (Cohen Dep. at 262:9-21). The Defendants' Websites are replete with these adjectives as they apply to both Cohen and CAM (Exhibits C and D). These non-falsifiable statements of opinion cannot constitute defamation.

c. Statements About Cohen and CAM's Actions Are Also Expressions of Subjective Opinion

The Websites also contain statements regarding the actions of Cohen and CAM, rather than mere adjectives. While these statements may appear factual taken in isolation, such as within Plaintiff's Complaint, these statements are also matters of opinion when read within their proper

context. *See Cox*, 812 F. Supp. 2d at 1223 (collecting examples of accusations of criminal actions being found to constitute non-defamatory opinion). As such, they are not actionable as defamation.

In particular, Defendants have stated that Plaintiffs' business is structured as an "intricate web," or "elusive" and "complex web." (Exhibit C at 2, 3, 6; Exhibit D at 2-3, 34). Defendants have also stated its opinion that CAM and its affiliate company are "attempting to scam former tenants out of millions of dollars." (ECF 40 ¶ 42, Exhs. 1, 3) Within the context of the Websites, though, these are not statements of fact. Based on the critical nature of the site, and its inherent nature as an anonymous web presence allowing for third party comment and participation (Exhibit C at 7 (displaying anonymous comment); Hansen Dep. 172:16-25), they would not be interpreted as such. *See Sandals*, 925 N.Y.S.2d at 415-16; *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1104 (N.D. Cal. 1999) (accusing plaintiff of criminal activity found "too loose and hyperbolic to be susceptible of being proved true or false").

This is not a novel position; even accusations of blackmail have been found to constitute opinion in the past. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Similarly, claims that plaintiffs acted "unprofessionally," or "unethically," and that a plaintiff was "untrustworthy" or "incompetent" have been found to be statements of the speaker's opinion, rather than fact. *Wait v. Beck's N. Am., Inc*., 41 F. Supp. 2d 172, 183 (N.D.N.Y. 2003); *Tasso v. Platinum Guild Int'l*, No. 94 Civ. 8288, *1998 U.S. Dist. LEXIS 18908* at *5-6 (S.D.N.Y. Dec. 3, 1998). Thus, even the Websites' statements stating that Plaintiffs took specific actions do not actually mean, in context, that Plaintiffs actually engaged in improper behavior – the Defendants' statements represent nothing more than their own feelings about Plaintiffs' actions.

ii. Third Parties Agree That Criticism Is Not Necessarily Factual

Plaintiffs' evidence agrees with the position that critical statements may be opinions, and not necessarily factual. As such, no speculation is needed to determine whether a reasonable person would interpret the Websites' contents as statements of fact or opinion: They are opinion. *Gardner*, 563 F.3d at 987 (holding that determination of a statement's status of fact or opinion is made through the eyes of a "reasonable factfinder"). One of Plaintiffs' own witnesses

acknowledged that a speaker could express his or her opinion, without making a statement of fact, for the purpose of criticizing another (Westreich Dep. at 55:5-22) as Defendants have done.

iii. Defendants' Statements Constitute, In Part, Rhetorical Hyperbole That a Reasonable Person Would not Find to be a Statement of Fact

The Websites' over-description of Cohen and CAM's conduct lead to the conclusion that their contents are not to be, and would not be, interpreted as statements of fact. Indeed, the kind of overheated language the Defendants used in creating the Websites conveys that an opinion, rather than an objective fact, is being asserted by the words on the screen. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). The Defendants' use of strong words on the website, to both build up Cohen and CAM's reputation and to question their conduct with equal intensity, are indicative of their use as rhetorical devices, rather than assertions of fact. Just as quickly as Defendants described Plaintiffs as glamorous, prestigious, wealthy and fortunate, the Websites use equally over-descriptive terms to express their skepticism of Plaintiffs' business – describing their dealings and relationships as complex, elusive, and intricate (Exhibit C at 2-4; Exhibit D at 2-7, 34).

The Defendants' choice of language indicates the rhetorical nature of their statements to the reasonable reader. Comparison of an individual to even a notorious gangster is not automatically defamatory. *Gilbrook*, 177 F.3d at 863 (finding comparison to Jimmy Hoffa to be rhetorical hyperbole). Even accusations of serious criminal conduct fall within this category – accusing someone of an act as heinous as rape may still be rhetorical hyperbole. *Gold v. Harrison*, 962 P.2d 353 (Haw. 1998), *cert. denied* 526 U.S. 1018 (1999) (finding that defendant's description of plaintiff's conduct as "rape" within a property dispute was non-defamatory hyperbole); *Cox*, 812 F. Supp. 2d at 1224 (collecting instances of accusations of misconduct found to be mere rhetorical hyperbole); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 463 (S.D.N.Y. 2012) (holding that terms "shyster," and "con man" are instances of rhetorical hyperbole understood as a statement of opinion). An accusation that on its own could be defamatory loses its character when used with other "colorful adjectives" that, taken together, convey "nothing more substantive" than the speaker's subjective, non-falsifiable thoughts. *Standing Committee v. Yagman*, 55 F.3d 1430, 1440

(9th Cir 1995). Defendants' use of extreme language should serve – and did serve – as a sign to reasonable viewers that the Websites' statements should not be taken as literal statements of fact.

Defendants' use of rhetorical questions further support the conclusion that the Websites' contents are non-defamatory hyperbole. Rhetorical questions can serve two purposes: to make clear the speaker's lack of definitive knowledge about an issue, or inviting the reader to consider other justifications for the speaker's actions – negating the impression that the statements imply a false assertion of fact. *Cox*, 812 F. Supp. 2d at 1224-25, *citing Point Ruston, LLC v. Pac. N.W. Reg'l Council of the United Bhd of Carpenters & Joiners of Am*., Case No. C-09-5232 *2010 WL 3732984* at *8 (W.D. Wash. Sept. 13, 2010). Use of exaggerated terms, such as calling a plaintiff a "crook," lends to the finding that a rhetorical question is not defamatory. *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005). Moreover, use of a rhetorical question "negates the impression that [the] statement implied a false assertion of fact," and instead, "the author's use of a question made clear his lack of definitive knowledge and invited the reader to consider various possibilities." *Partington v. Bugliosi*, 56 F.3d 1147, 1155, 1157 (9th Cir. 1995); *see Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992) (finding rhetorical question non-defamatory because it could reasonably be understood "only as [the author's] personal conclusion about the information presented," and not a statement of fact).

Defendants' rhetorical questions in this case are subject to the same analysis. On the Websites, the Defendants ask:

> "Is Bradley S. Cohen the Next Bernie Madoff?"
> "[Cohen] has been a contortionist when it comes to keeping the secret of his true financial picture, creating a complex web of companies and dealings, but how long can this continue?"
> "With hundreds of millions of dollars in complex financial transactions and loans between numerous companies and investors, how can investors guard against a Ponzi scheme or fraud?"
> "If company officials don't even know how investor funds are managed, how can investors and business partners feel secure?"
> "How can a company and its owner profit while investors are losing big?"
> "Is this the reason for Cohen's vague background?"
> "How many millions has it taken from its thousands of other tenants?"

These statements contain the same heated rhetoric of the rest of the Websites, and would lead a reasonable viewer to construe them as statements of opinion, rather than fact. *Troy Group*, 364 F. Supp. 2d at 1156. When a speaker outlines facts available to him or her, making it clear that the statements represent his or her own interpretation of those facts – but inviting the reader to draw his or her own conclusions – the resulting statements generally receive First Amendment protection. *Nicosia*, 72 F. Supp. 2d at 1102. Defendants' use of question marks to signify knowledge they do not possess, ranging from knowledge of Plaintiffs' operations and financial condition to avoiding losses when faced with complex financial transactions (Hansen Dep. at 57:21-58:20), further demonstrates that the questions are not statements of fact. *Bugliosi*, 56 F.3d at 1155, 1157.

3. Defendants' Statements are At Least Substantially True and Not Defamatory

Truth is a defense to defamation, but absolute truth is not needed to defeat such an action – the defense of truthfulness "overlooks minor inaccuracies and concentrates upon substantial truth." *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991). For this defense to defeat a claim for defamation, all that is required is that the "substance, the gist, the sting" of the statement be factually correct." *Id*. at 517; *see D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1287-88, 1289 (C.D. Cal. 2000) (finding evidence to support defendants' statements as "substantially true," and holding that it is not a jury question); *Adelson v. Smith (In re Smith)*, 397 B.R. 124, 126 (D. Nev. Bankr. 2008) ("even if [the allegedly defamatory] statements were written without care or other justification, some were nonetheless true," citing *Masson*); *Pegasus*, 118 Nev. at 715 n. 17 ("substantial truth provides that minor inaccuracies do not amount to falsity"). Whether or not a statement is substantially true is a question of law to be decided by the Court. *Pegasus*, 118 Nev. at 715 n. 17; *see D.A.R.E. America*, 101 F. Supp. 2d at 1287-88. Based on the facts below, many of the statements Defendants made about Plaintiffs, to the extent they were factual at all, were completely or at least substantially true.

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i. CAM Cannot Show Statements About Its Financial Condition Are False and Defamatory

a. Investors In the CAM Core+ Fund 1 Have Incurred Tens of Millions of Dollars in Paper Losses Over the Fund's Life

The Cam Core+ Fund 1 (the "Fund") had incurred significant losses during its lifespan. The Fund was funded with 85 million dollars and used to purchase commercial and industrial real estate (McGinness Dep. at 35:2-36:16). These individual properties are owned by individual limited-liability companies created for the sole purpose of owning a particular property[8] (McGinness Dep. at 36:17-21); the aggregate value of these properties constitutes the value of the Fund. The Fund's value was accounted on a fair value accounting basis, where the value of the properties comprising the Fund's assets was calculated based on what they could be sold for on the prevailing market on a regular basis (Cohen Dep. at 186:10-188:5; McGinness Dep. at 25:6-8, 82:2-14, 87:23-88:13; Exhibit H at 3). By Plaintiffs' own admission, the fair market value of the Fund's assets was "written down," or decreased, by over $45 million between 2008 and 2010 (Exhibit H at 3). By any common use of the word, this is a "loss" of tens of millions of dollars.

Plaintiffs contend that this is untrue is based on accounting technicalities. Plaintiffs' position is that because the Fund's assets have not been liquidated, no loss has been *realized*. (McGinness Dep. at 83:4-14, 87:23-88:13, 91:14-92:3; Cohen Dep. at 185:22-186:8) However, this perspective elevates an accounting technicality over the black-and-white figures of the Fund's fair market value accounting and the plain meaning of the English language. By late 2010, the real estate assets within the funds had declined $45 million in value (Exhibit H at 3). Plaintiffs' witnesses recognize that this is equivalent to an individual purchasing a house for $400,000 and having its market value decline to $200,000 while he or she owns it (Cohen Dep. at 185:22-186:8; *see* McGinness Dep. at 83:4-14;). Yet, Plaintiffs claim that it is defamatory for Defendants to say investors "lost" money because the asset – although valued far below its purchase price – had not

[8] In limited cases, one limited-liability company may own more than one piece of property. (McGinness Dep. at 36:17-37:4)

been sold, precluding any loss from being "realized." (McGinness Dep. at 83:4-14, 87:23-88:13, 91:14-92:4).

Plaintiffs' analysis places too fine a point on what is necessary to constitute substantial truth. Here, the fair market value of the Fund's assets declined by $45 million as of September 2010. This constitutes "tens of millions of dollars," just as the Defendants claimed. That Plaintiffs' claim for defamation is based on accounting nuances demonstrates the substantial truth and accuracy of Defendants' statements. Finding Defendants' statements that investors in the Fund lost tens of millions of dollars when the value of the Fund's assets decreased more than $45 million would be antithetical to the entire notion of substantial truth. Substantial truth does not require perfect accuracy. Instead, it requires only a generally correct statement, even at the expense of some details. Defendants have made a substantially true statement about the Fund's performance. It is not defamation.

b. CAM Is Unable to Refute The Websites' Other Charts and Representations of Its Losses

The charts Plaintiffs produced in an effort to refute the Defendants' diagrams of the Fund's performance do not serve their goal. In fact, the chart titled "Total Return Composition Net of Fees As Of 9/30/2010" is a direct copy from CAM's 3d Quarter Financial Report (*compare* Exhibit C at 6, Exhibit D at 9 and ECF 40-1 at 85). CAM's analysis of its total assets (Exhibit H at 1) and the Defendants' chart depicting the same (Exhibit C at 5; Exhibit D at 8) show the exact same starting and ending points. If anything, Defendants' rendering of the data through a smoothed trend line is more favorable to Plaintiffs than their own depiction, which shows a more precipitous drop in total assets from the first to the second quarter in 2010 (*compare* Exhibit H at 1 and Exhibit C at 5, Exhibit D at 8).

Plaintiffs also attempt to refute Defendants' depiction of their decrease in cash and cash equivalents. Defendants' chart shows a decline of "cash and cash equivalents" from around $2.75 million to under $1 million from January 2009 to January 2010. Plaintiffs attempt to rebut this with a chart of "Cash & Restricted Cash," without explaining what "restricted cash" is (Exhibit H at 2-3). The comparison of "cash and cash equivalents" to "cash and restricted cash" is one of

apples to oranges; the two categories of cash are not interchangeable by CAM's own admission (Exhibit H at 2). Regardless, both Defendants' and Plaintiffs' chart show a steep downward slide in both "cash and cash equivalents" and "Cash & Restricted Cash" from January 2009 to January 2010 (*compare* Exhibit H at 1 and Exhibit C at 6; Exhibit D at 9). The Defendants' chart is an accurate depiction of CAM's declined cash holdings.

ii. By Any Measure, Bradley Cohen Lives a Life of Luxury

Cohen contends that allegations regarding his lifestyle are defamatory (ECF 40 ¶ 9; ECF 40-1 (Exhibit 1)). To the extent that Defendants' characterizations of his habits as luxurious are not opinions, they are true, or at least substantially true. Cohen's house is located within Bel Air and estimated to be worth at least 15 million dollars – likely more than 20 million dollars (Cohen Dep. at 82:17-83:5; Fishman Dep. at 82:2-7). It is "around 11,000 square feet" (Cohen Dep. at 80:21-81:18), and Defendants included a photo of it on the Websites for readers' reference (Exhibit C at 12; Exhibit D at 11). Notably, that photograph was taken from a website that was already accessible to the general public. (Firebaugh Dep. at 90:11-91:3). Additionally, Cohen refinanced his mortgage on the residence in 2009 to take advantage of remarkably low interest rates – around only 1% per year (Cohen Dep. at 83:6-16). Even if the Defendants' statement that Cohen lives in a "mansion" were interpreted as one of fact, rather than opinion, it would be an accurate statement.

Even since the economic recession that began in 2008, Cohen has made more than one million dollars per year in gross income every year (Exhibit I; Fishman Dep. at 84:11-87:7, 90:10-91:10). Prior to that downturn, Cohen's annual gross income was as high as over five million dollars per year (*id.*). Cohen estimates his personal net worth to be more than 50 million dollars (Cohen Dep. at 98:6-25), and he invests in every property managed by CAM (Cohen Dep. at 247:4-7). Cohen and his wife have given hundreds of thousands of dollars to charity, some of which came in "smaller amounts of 10,000 [or] 25,000" dollars. (Cohen Dep. at 73:9-74:12)

In addition, Cohen employs an undisclosed personal security detail (Cohen Dep. at 56:9-16). The particulars of Cohen's personal security are unknown, although Steven Fishman described the security presence at the recent wedding of Cohen's daughter as a scene reminiscent of

the 1992 film *The Bodyguard*. (Fishman Dep. at 24:4-16) While Defendants' descriptions of Cohen's quality of life are properly statements of opinion, any factual element they may contain is verified by the Plaintiffs' own witnesses.

iii. Many of the Comparisons Between Cohen / CAM and Madoff are Factually Accurate

The table of similar activities between Cohen and his company, and Bernard Madoff and his, contain numerous facts that have been verified to be true. Some of these statements, such as the company's structure being a "web" and discussion about the company's leadership's discussion of financial dealings, are addressed elsewhere in this motion. A number of these statements, though, can be dispatched without particularly detailed analysis.

Cohen founded CAM, a real estate investment firm (Cohen Dep. at 161:10-16). CAM investors must be accredited investors under Securities and Exchange Commission Rule 501 of Regulation D,[9] (Cohen Dep. at 161:10-12; McGinness Dep. at 39:24-40:4), individual securities within the companies that own property managed by CAM are sold for $100,000 each (Cohen Dep. at 243:21:-244:18; Exhibit J at 1). Cohen's own accountant invested – and lost – $50,000 with CAM (Fishman Dep. at 103:12-104:1). Other CAM investors represent or control institutional investors, such as pension funds, real estate investment companies, and investment funds (Decl. of Westreich ¶¶ 1-2; Decl. of Batkin ¶ 3). CAM's office is located in Century City (McGinness Dep. at 71:20-22), which is adjacent to Beverly Hills, California.

Next, the Websites state that Cohen has "overall responsibility for management of his firm, strategically directs investment funds." (Exhibit C at 2; Exhibit D at 2) This is also true. Cohen is the CEO of CAM. He also sits on the investment committee. This committee makes investments by majority rule, but requires Cohen to be part of the majority vote in order to take action (Exhibit

[9] This rule defines what persons or entities may constitute accredited investors who are allowed to purchase or participate in more sophisticated investment vehicles than are available to the general public, such as hedge funds and private equity funds. This rule allows individuals to participate in such investments as accredited investors if they possess more than $1 million in assets exclusive of their primary residence, or have earned income of more than $200,000 for the past two years with the reasonable expectation of the same income in the future (for married individuals, household income must be in excess of $300,000). (Exhibit J at 6; Cohen Dep. at 243:17-244:16)

K; McGinness Dep. at 29:16-30:3). This process of evaluating and deciding on what investments to make qualifies as "strategically direct[ing] investment funds." (Exhibit K)

CAM is headquartered on the prestigious Avenue of the Stars (Cohen Dep. at 171:9-10; *see* ECF 40-4 at 29). CAM's "neighbors" on the Avenue of the Stars include: 1) Creative Artists Agency, a preeminent talent agency; 2) DLA Piper, a prominent global law firm; 3) McKinsey & Company, an elite management consulting firm; 4) JP Morgan, an premier investment bank; 5) Moelis & Company, an exclusive boutique bank; 6) Susman Godfrey LLP, an elite litigation law firm; and many other well-known business entities (Exhibit L). Based on CAM's neighbors, the company's headquarters exist within rarified air among other prominent businesses.

Personally, Cohen is a member of the Board of Governors at Cedars Sinai Medical Center and served on the National Board of the Friends of the Israeli Defense Forces (ECF 40 ¶ 13; Cheryl Cohen Dep. 12:11-15, 12:24-13:4). He also previously served on the board of directors for NAREIM (Exhibit B; Cohen Dep. 36:22-37:13). Cohen has also made political contributions worth tens of thousands of dollars per year in the past (Cohen Dep. at 177:4-178:21). Based on the evidence adduced in this case, these statements are at least substantially true, if not entirely so. As such, they cannot constitute defamation.

iv. Defendants' Statements About CAM's Business Practices Are Also True or Substantially True

a. The Web of Companies

Defendants have produced charts showing the connections between Cohen, Brandon Delf, and numerous limited-liability companies on their Websites (Exhibit C at 7, 15; Exhibit D at 10, 18). The Websites describe Cohen's relationship with these companies as a web, describing it as complex and intricate. Doreen Ray, CAM's Executive Vice President of asset management described the structure of CAM's asset management as "multilayered." (Ray Dep. at 140:9)

Cohen himself does not know exactly how many companies he is an officer of (Cohen Dep. at 41:6-42:5), but invests in every deal made by CAM by becoming a member of the limited-liability company used to purchase and own property (Cohen Dep. at 97:1-24, 247:4-7). The properties owned by these limited-liability companies are managed by a separate company created

by CAM, which receives a 20% promotional interest of the property's revenue and value for managing the property (Cohen Dep. at 245:21-247:3). This promotional interest in each property CAM manages ultimately is paid to CAM and Cohen himself (Cohen Dep. at 247:2-3).

Thus, there are hundreds of limited-liability companies in which Cohen and other CAM executives (Cohen Dep. at 245:21-247:3) are members. These numerous limited-liability companies distribute 80% of their earnings to their members, including Cohen and potentially other CAM executives (*id*.). The remaining 20% of the limited-liability companies' earnings are paid to one of the managing entities that is created to manage it, and which is an affiliate of CAM (*id*.) This 20% promotional interest is then paid to CAM and its executives (*id*.) This network of cash flows to Cohen directly and through CAM by way of its affiliated companies may be an industry standard practice (Cohen Dep. at 247:8-15). However, the multiple channels through which money earned by each individual LLC passes to reach Cohen can fairly be described as a web.

b. CAM Employees' Knowledge of CAM Operations and Cohen's Finances

Defendants state on the Websites that Doreen Ray, an Executive Vice President at CAM (Ray Dep. at 142:20-22), was "uncomfortable answering questions" about Cohen and his financial dealings (Exhibit C at 4-5; Exhibit D at 7-8). Doreen Ray confirmed that this is true, admitting that she was uncomfortable being asked anything about Cohen individually when testifying as the party most knowledgeable for Auburn Valley Industrial Capital. (Ray Dep. at 145:13-146:2) Based on the context of her deposition, she declined to answer questions about Cohen or CAM beyond Auburn Valley Industrial Capital, and herself stated she was "uncomfortable" answering those questions (Ray Dep. at 144:18-146:2). Her refusal to answer these questions is substantially identical to an inability to do so, and in any event can be subjectively described as such.

c. CAM's Occupancy Rate and Operating Expenses

CAM and its affiliated companies do have properties with occupancy rates that are around 28%; in fact, some of them are totally vacant. (Ray Dep. at 146:3-10; 149:17-20 ("okay, yes, I have some occupancy rates that are 28 percent, certainly not in the portfolio … it's one property out of 24")). Logically, an unoccupied building generating upkeep costs and annual property taxes

without a tenant to pay rent generates operating losses – a point CAM did not deny, but justified by stating that such a vacancy should be considered in the context of a portfolio of other properties "so the one vacancy is not causing a struggle or a financial problem *on the portfolio*." (Ray Dep. at 147:9-15) (emphasis added) CAM's vacant properties are not generating revenue while empty (McGinness Dep. at 79:16-17). While the losses caused by one vacant property may be offset by the whole portfolio, this does not negate the reality that CAM's vacant properties incur operating losses on their own by the very nature of their vacancy, and these losses persist while the property is vacant.

d. CAM's Litigious Nature

Defendants have contended that CAM and "any of its companies … are known to sue tenants and former tenants based on unfounded accusations and greed." (ECF 40 ¶ 47; Exhibit D at 34). Defendants continued:

> Under Bradley Cohen's stewardship, the company and its properties have been involved in numerous lawsuits. In a current Seattle lawsuit, the company is attempting to scam former tenants out of millions of dollars. The company has taken several hundred thousand dollars from one former tenant in one lawsuit.

(ECF 40 ¶ 47; Exhibit D at 34). As discussed above, Defendants' commentary on CAM and its related companies' motives for litigation are statements of their subjective opinion. The factual elements of this statement, though, are provably true.

Since 2009, CAM and its affiliated entities have commenced six known lawsuits against its tenants (Exhibit M; Cohen Dep. at 198:12-201:1). This litigation has been over spaces as small as 12,500 square feet, and as large as 68,779 square feet (*id*.). This evidence suggests there may be even more undisclosed litigation: CAM's report reveals only landlord-tenant litigation CAM has filed as a plaintiff, as opposed to other business torts, and only since 2009 (*id*.).[10] Accepting that this chart provided by CAM represents only a portion of CAM's litigation, it supports the accuracy of Defendants' claims about CAM and its related companies' litigation practices. In reality, CAM

[10] As seen from this lawsuit, also filed by CAM, the company's tendency toward litigation is not limited to landlord-tenant disputes.

has initiated lawsuits, including this one, for matters other than landlord-tenant disputes (Exhibit N).

Additionally, Plaintiff's own allegations verify Defendants' statements. While Defendants' use of the word "scam" in describing the Seattle litigation is an opinion, that lawsuit is brought by AVIC – an affiliate of CAM – and is on appeal. (ECF 40 ¶¶ 28, 31; Hansen Dep. at 110:1-6) AVIC obtained judgments for damages, attorneys' fees and costs in excess of $2 million against NWTM – a former tenant of AVIC's property (ECF 40 ¶ 31). Plaintiffs' own accounting of events supports the accuracy of the Defendants' statements, demonstrating their truth.

4. Defendants' Statements Concerning the Criminal History of Bradley S. Cohen Are a Privileged, Fair Report of Judicial Proceedings

The First Amendment privileges accurate reports of official proceedings. "Under the fair report privilege, the publication of defamatory matter concerning another in a report of an official action or proceeding of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001); *see Sahara Gaming v. Culinary Workers*, 115 Nev. 212, 984 P.2d 164 (1999). California has memorialized this protection in California Civil Code § 47. Specifically, California Civil Code § 47(e) confers this privilege on a "fair and true report" of the proceedings of a lawful public meeting or made for the public benefit.

Defendants' statements are within these boundaries. The only original content Defendants contributed to the extant information regarding Brad S. Cohen was to note Cohen's official biography is vague, and point out that Defendants' investigation has revealed "a criminal history involving fraud and money laundering for *a man with the same name and same approximate age*, in the real estate industry." (Exhibit D at 25) (emphasis in original). Defendants go on to ask, "Is this the reason for Cohen's vague background?" (*Id.*) Discharging their duty under *Gertz*, Defendants note that both Cohen and Brad S. Cohen have succeeded in the real estate industry, are from the same geographic area, have the same name, and are about the same age. (*Id.*)

This portion of the Websites consists of news stories from the early 1990s and a full copy of the United States Court of Appeals for the Third Circuit's order in the *Banks v. Wolk* case, 918 F.2d

418 (3d Cir. 1990), in which Brad S. Cohen was an appellee (Exhibit D at 37-46). Defendants added no commentary to the Third Circuit's decision, adding only the title "RICO Case" to that webpage. The *Banks* decision was, in fact, a RICO case (Exhibit D at 37 ¶ 1). Defendants' conduct with respect to the additional *Inquirer* articles is identical (Exhibit D at 26-33). Defendants republished a series of stories that *The Inquirer* published in the early 1990s, which are expressly based on judicial events. Defendants merely added their own titles to the pages where the *Inquirer* articles were found, often less inflammatory than the headlines chosen by the *Inquirer*.

For these articles, Defendants' fair report is a report on the report: Defendants have republished the original *Inquirer* articles and added their own title to them. It was the *Inquirer* that conducted the reporting based on judicial proceedings, which Defendants republished. This specific content constitutes either a wholesale republication of a judicial opinion (Exhibit D at 37-46) or articles about judicial activities (Exhibit D at 26-33). As a fair and accurate report of the Inquirer articles, which are not alleged to be false, Defendants' statements on the Website constitute a fair report. Consistent with California Civil Code § 47(e)(2), Defendants' publication of these materials were a fair report of judicial proceedings and made for the public's benefit, and sought to determine whether Cohen – a man who operates a lucrative investment firm – was the same Brad S. Cohen identified in the *Banks* decision and *Inquirer* articles. *Sanders v. Hearst Corp*., 27 Media L. Rep. 1733 (N.D. Cal. 1999) (holding that statements made to alert the public to the inaccuracies of FEMA's prior statements was for the public's benefit and a Constitutionally protected fair report). (Hansen Dep. at 34:16-24)

5. If Nevada Law Applied, CAM's Defamation Claim Would be Mispled, and Judgment Proper for Defendants

In the event Nevada law governs this dispute, Defendants are entitled to judgment on CAM's improper claim for defamation per se. Nevada law recognizes that claims for harm to a business' goods or services arising from false statements are not properly raised as defamation *per se*, but instead are to be pled as "business disparagement." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc*.,125 Nev. 374, 384-86, 213 P.3d 496, 504 (2009). These statements are not directed toward the company itself, but rather the goods and services it offers. *Id*., *citing Aetna Cas. & Sur.*

Co. v. Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1988). Defendants' statements go not to the reputation of CAM, but the investing services it provides, raising questions about its stability and transparency (Exhibit C at 1-7; Exhibit D at 1-7). As such, CAM would have to pursue the alleged wrongs under a theory of business disparagement, rather than defamation.

Even if CAM's defamation claim were transmuted into one for business disparagement, it would fail. The elements of business disparagement materially differ from those for defamation under Nevada law. *Virtual*, 125 Nev. at 386. To prevail on this claim, CAM must prove that Defendants 1) made a false and disparaging statement about its services; 2) that Defendants' statement was unprivileged; 3) that Defendants acted with malice; and 4) special damages. *Id*. For the reasons set forth above, CAM has failed to meet this burden. Defendants' statements were not false; moreover, they are privileged by the First Amendment. Defendants' statements were not made with malice, whether in the literary (Hansen Dep. at 34:12-24) or Constitutional sense of the word. *See Sullivan*, 264 U.S. at 279-80. Finally, as CAM admitted, it has no actual damages, which precludes it from satisfying the final element of this tort. (Exhibit E at 3, 4:13-14, 5) While CAM's failure to plead its cause of action as business disparagement rather than defamation should result in judgment in Defendants' favor on that claim, substantive analysis of the transmuted business disparagement claim leads to the same conclusion.

6. Plaintiffs Have No Evidence of Reputational Harm, and the Presumption of Harm May Therefore Be Rebutted

While damages in an action for defamation *per se* are presumed, this presumption may be rebutted, and the existence of damage disproved. Even presumed damages must ultimately have their basis in admissible evidence and be proven. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 766 (1985) (J. White, concurring) (noting even presumed damages "had to be proved" in defamation actions).[11] An award of presumed damages must be supported by evidence

[11] The problem of presumed damages, and the abuse of the First Amendment that they invite, led the Arkansas Supreme Court to abolish the presumption of damages in defamation actions within the state based on the "unjustifiable equities" their existence creates. *Burcham v. Murphy*, 691 S.W. 2d 752, 756 (Ark. 1998) (internal citations omitted).

to yield a meaningful recovery. *Republic Tobacco Co. v. N. Atl. Trading Co*., 381 F.3d 717, 734 (7th Cir. 2004). A defendant is permitted to rebut the presumption of reputational harm in defamation cases, and to disprove the existence of damage. *Davis v. Ross*, 107 F.R.D. 326, 330 (S.D.N.Y. 1985). Where the presumption of damages is rebutted upon proof that no damage exists, Plaintiffs' defamation claims logically fail.

Plaintiffs do not have evidence of reputational harm, and its absence is sufficient to rebut the presumption of harm accorded by a claim of defamation *per se*. The harms Cohen believe that he and CAM have suffered are purely speculative and based on Cohen's fear that unnamed, unknown other individuals have seen the Websites (Cohen Dep. at 114) – despite the fact that a reasonable viewer would not interpret its contents as factual. The only loss in reputation Plaintiffs can identify is speculative: Ohio State Teachers have stopped returning its phone calls while doing business with other investment firms (presumably because they have provided services CAM could have). CAM did a "big deal" with New York Life, but does not know whether the two parties will do another deal – despite not presenting the company, and others, with investment opportunities (Cohen Dep. at 114, 147). CAM's company line regarding its damages from the Websites is that its employees do not know if the phone does not ring. (Ray Dep. at 87:22-88:6; McGinness Dep. at 62:24-63:5; Cohen Dep. at 114:12-14)

To the contrary, Plaintiffs' financial positions are better than ever. CAM is on track to have a profitable year in 2013, and perhaps its best ever (McGinness Dep. at 99:22-100:6). More CAM employees than ever before are earning at least $150,000 per year (McGinness Dep. at 50:1-12; Exhibit G). Cohen continues to earn more than $1.3 million per year in income (Exhibit I). While Plaintiffs may receive presumed damages for pleading defamation *per se*, the absence of evidence supporting the existence of any damages, and even evidence of Plaintiffs' exceptional success, rebuts this presumption.

D. The First Amendment Protections Afforded to Defendants' Speech In the Defamation Context Apply to All of Plaintiffs' Claims

The First Amendment protections for Defendants' statements apply not only to Plaintiffs' defamation claims, but to every claim based on Defendants' expressive conduct. The United States

Supreme Court has held that no cause of action possesses "talismanic immunity from constitutional limitations." *N.Y. Times Co. v. Sullivan*, 376 U.S. at 269. The First Amendment's protections reach to "all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. N.Y. Times Co*., 728 P.2d 1177, 1184 (Cal. 1986). This broad protection is necessary to protect the rights of defendants sued by plaintiffs who "simply affix a label other than 'defamation' to their injurious-falsehood claims," such as "false light" invasion of privacy and intentional infliction of emotional distress.[12] *Id*. The remainder of Plaintiffs' claims, which are not for defamation but nonetheless based on Defendants' expressive conduct, are thus subject to the defenses and analysis identified above.

E. **Defendants Are Not Liable for Invasion of Privacy – False Light**

Plaintiffs' claim for false light is all but duplicative of their defamation claims, and thus the same privileges and defenses apply. *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002), *citing People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd*., 111 Nev. 615, 895 P.2d 1269, 1274 n.4 (Nev. 1995); *Hawran v. Hixson*, 209 Cal. App. 4th 256, 277 (Cal. Ct. App. 2012) ("to establish a false light invasion of privacy claim, [plaintiff] must meet the same requirements" as pleading defamation); *Selleck v. Globe Int'l*, 166 Cal. App. 3d 1123, 1134 (Cal. Ct. App. 1985) (finding false light "is in substance equivalent to a libel claim").

California's courts have recognized that pleading and proof of special damages – specific instances of financial loss – are required to proceed with a false light claim when a statement is not defamatory on its face. *Fellows*, 42 Cal. 3d at 251 (requiring all statements that are not defamatory on their face and the basis of a false light claim be supported by pleading and proof of "special damages" under Cal. Civ. Code § 45(a)); *see Kinsey v. Macur*, 107 Cal. App. 3d 265, 275 (Cal. Ct. App. 1980). Such is the case here, where the Websites' statements are allegedly defamatory based on information known to Plaintiffs. If the Websites' defamatory character were apparent on their

[12] The United States Supreme Court has ratified this line of thinking, holding that a public figure must prove actual malice to recover on a claim for intentional infliction of emotional distress. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988); *Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207, 1219 (2011).

face, though, Plaintiffs would need to prove only reputational damages under California law. *Kinsey*, 107 Cal. App. 3d at 275; see Flowers, 310 F.3d at 1132-33 ("California … requires injury to reputation for both false light and defamation"). Thus, if Plaintiffs' defamation claims fail under California law, so too do its false light claims. Nevada requires that damages for invasion of privacy claims, including false light, arise from the general damage of being exposed to the public. *Berosini*, 111 Nev. at 636-37; *Flowers*, 310 F.3d at 1132.

Neither Cohen nor CAM have proven the existence of special damages arising from Defendants' alleged invasion of privacy. In fact, this is a central plank of Plaintiffs' litigation strategy – they have not claimed any actual damages, and have premised this litigation entirely based on the presumed general damages from Cohen's defamation claim (Exhibit E at 3, 4:13-14, 5; Exhibit F at 4:12-13, 5-6). Under California law, this admission alone is sufficient to dismiss both Plaintiffs' false light claims. *Fellows*, 42 Cal. 3d at 251.

To the extent CAM can claim any reduced business, its claims are speculative and not based on credible evidence (Stern Dep. at 47:11-48:25, 50:10-15, 51:15-52:4, 52:9-53:17, 55:15-56:10). CAM also cannot show a loss of reputation beyond Cohen's assumptions (Cohen Dep. at 113:18-114:22). As a purely legal entity, CAM cannot incur general emotional pain and suffering as a matter of logic. This failure of damages calls for judgment to be entered in Defendants' favor on CAM's false light claim.

Cohen himself also has failed to show specific damages or reputational harm as required under California law. Even Cohen's general damages – namely loss of sleep (Cohen Dep. at 42:19-43:9, 44:14-45:24, 119:4-24) – are inadequately linked to the Websites. As Defendants' rebuttal expert Dr. Lewis Etcoff points out, numerous other stressors in Cohen's life, ranging from managing CAM's expanding success to the anxiety he experiences managing his family life, are the true sources of his anxiety (Rebuttal Expert Report of Dr. Lewis Etcoff, Exhibit O). For the same reason Plaintiffs' defamation claims against Defendants are inadequate, and for the additional reason that Plaintiffs have not properly established damages under California law, summary judgment should be entered in Defendants' favor on Plaintiffs' false light claims.

F. Cohen Cannot Prevail at Trial on His Claim for Intentional Infliction of Emotional Distress

To prevail on a claim for intentional infliction of emotional distress, Plaintiffs must prove (1) extreme and outrageous conduct with the intent to cause or reckless disregard for emotional distress; (2) that Plaintiffs suffered emotional distress; and (3) actual or proximate causation. *Kennedy v. Carriage Cemetery Services*, 727 F.Supp.2d 925, 933 (D. Nev. 2010); *McKinzy v. AMTRAK*, 836 F.Supp.2d 1014, 1028 (N.D. Cal. 2010). Plaintiffs cannot satisfy two of these elements. The underlying conduct Cohen seeks to punish – Defendants' publication of words on the Internet – does not satisfy the requirement of extreme or outrageous conduct. Moreover, the damages Cohen claims to have suffered, namely his obsession with the case (*See* Expert Report of Dr. Saul Faerstein, Exhibit P at 3) are not severe enough to support a finding of emotional distress, and may not even be attributed to Defendants at all. Therefore, Plaintiffs cannot show intentional infliction of emotional distress, and judgment should be in favor Defendants.

1. Defendants' Underlying Conduct Was Not Extreme or Outrageous

Extreme or outrageous conduct is conduct that must "go beyond all possible bounds of decency" and must be "intolerable in a civilized community." *Braunling v. Countrywide Home Loans, Inc.,* 220 F.3d 1154, 1158 (9th Cir .2000); *Coleman v. Republic Indemnity Ins. Co.*, 132 Cal. App. 4th 403, 416, 33 Cal. Rptr. 3d 744 (Cal. Ct. App. 2005); *Urbina v. Homeview Lending, Inc.,* 681 F. Supp. 2d 1254, 1261 (D. Nev. 2009).

Under California law, defamatory accusations are not sufficient to give rise to an action for intentional infliction of emotional distress. *Walker v. Boeing Corp.*, 218 F.Supp.2d 1177, 1184 (C.D. Cal. 2002), *citing Alcorn v. Anbro Eng'g, Inc.,* 2 Cal.3d 493, 499, 468 P.2d 216, 86 Cal. Rptr. 88 n.5 (1970); *Agostini v. Strycula*, 231 Cal.App.2d 804, 806-09, 42 Cal. Rptr. 314 (1965); *Perati v. Atkinson*, 213 Cal.App.2d 472, 473-74, 28 Cal. Rptr. 898 (1963). Conduct exhibiting "mere rudeness and insensitivity" is not enough to show intentional infliction of emotional distress. *Braunling*, 220 F.3d at 1158, *citing Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1991). Similarly, Nevada law does not extend liability for emotional distress to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Lopez v. UPS*, *2009 U.S. Dist. LEXIS*

47520 at *14 (D. Nev. 2009), *quoting Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956, 962 (D. Nev. 1990), *aff'd* 975 F.2d 588 (9th Cir. 1992). People are "expected and required to be hardened … to occasional acts that are definitely inconsiderate and unkind." *Id., quoting Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998).

Neither Nevada nor California law creates a finding that Defendants' publication of the websites about Plaintiffs reaches the level of extreme and outrageous conduct required to support a claim for intentional infliction of emotional distress. Defamatory accusations such as the ones Plaintiffs allege are not "extreme and outrageous conduct." Particularly, businessmen who run successful companies should be hardened to criticism and questioning about their business tactics, and the hyperbolic comparison to another does not go beyond the bounds of decency. *See Braunling*, 220 F.3d at 1158; *Lopez*, *2009 U.S. Dist. LEXIS 47520* at *14. Fundamentally, Cohen seeks to hold Defendants liable for publishing words on the Internet (Cohen Dep. at 272:6-8; ECF 40 ¶¶ 9-12). The act of committing thoughts to words is no different than Defendants writing an e-mail, passing a note, or leaving an anonymous message on a bathroom stall. While Cohen's umbrage comes from the content of those statements - which in and of itself is not outrageous – the underlying physical action that caused those words to exist is nothing more than the publication of written words on a computer screen. This is a far cry from the kind of actions that constitute extreme and outrageous conduct. Because Defendants' conduct was not extreme and outrageous, Plaintiffs cannot satisfy the first element of intentional infliction of emotional distress.

2. Cohen Has Not Sufficiently Demonstrated Emotional Harm Arising from the Defendants' Conduct

Nevada law requires a physical manifestation to show that a plaintiff has suffered emotional distress. *Kennedy v. Carriage Cemetery Services*, 727 F.Supp.2d 925, 933 (D. Nev. 2010), *citing Miller v. Jones*, 114 Nev. 1291, 970 P.2d 571, 577 (Nev. 1998) and *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433, 126 Nev. Adv. Rep. 17 (2010). "Insomnia and nightmares standing alone will not support at IIED claim in Nevada." *Id.* Feelings of inferiority, headaches, irritability, and weight loss are not sufficient to show emotional distress. *Alam v. Reno Hilton Corp.*, 819 F.Supp. 905, 911 (D. Nev. 1993).

Similarly, California law requires a plaintiff to suffer "severe" emotional distress, as "distinguished from trivial or transitory" to sustain a claim for intentional infliction of emotional distress. *Girard v. Ball*, 125 Cal. App. 3d 772, 787 (Cal. App. 1981). Specifically, severe emotional distress means "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." *Id.* at 788. A plaintiff's discomfort, worry, anxiety, upset stomach, concern, and agitation resulting from a defendant's comments do not rise to the level of "severe" under California law. *Hughes v. Pair*, 209 P.3d 963, 976-77 (Cal. 2009); *see also Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1246 (9th Cir. 2013) (finding anxiety, sleeplessness, upset stomach, and muscle twitches were not severe enough to show emotional distress).

Without damages arising from extreme or outrageous conduct, a claim for intentional infliction of emotional distress cannot succeed. Cohen's evidence demonstrates that he cannot satisfy this standard. Since discovering the Websites, Cohen has had changes in his sleeping pattern and unusual dreams involving Ross Hansen (Exhibit P at 3; Exhibit Q; Faerstein Dep. at 154:20-155:23). These were not a sudden, immediate, and overwhelming effect of discovering the Websites for the first time. In fact, since discovering the Websites, Cohen has improved his health by losing approximately 30 pounds (Cohen Dep. 120:6-7; Fishman Dep. 38:24-39:2). To the extent Cohen has suffered any distress from the Websites, it is his own self-imposed anxiety over others discovering its contents (Cohen Dep. 42:19-43:9, 44:14-45:24, 119:4-24, 120:17-23; *see* Exhibit P at 3-4) despite the Websites' visitation statistics being inflated (Hansen Dep. at 148:7-25; Firebaugh Dep. at 102:2-103:4).

Furthermore, according to Dr. Saul Faerstein's expert report for Plaintiffs, Cohen's distress appears to be limited to his own state of mind. (*See* Exhibit P at 3) The Websites have become an "obsession" of Cohen's, checking the Internet "daily" and becoming "consumed by the lawsuit." (Exhibit P at 3-4) Cohen spends "countless hours working on the case, sending articles and notes to his attorney, reviewing evidence and deposition transcripts," time which the report says Cohen believes "could be spent in more productive activities." (Exhibit P at 3). This obsession is not he direct result of anything Defendants did, but was caused by Cohen's own actions.

It is not clear that these reactions are accurately attributed to the Websites at all. Even if they are, they are too distant, remote, and minute to be the types of damages that may be the basis for an emotional distress claim. Faerstein failed in his report to consider any potential long-term disorders Cohen may suffer from that could explain his behavior and pre-date Defendants' publication of the websites. (Exhibit O at 2) Dr. Faerstein also did not adequately assess Cohen's psychological resiliency or non-subject-incident stressors that could have contributed to the symptoms Cohen reports. (Exhibit O at 3).

Even if the Court determines Mr. Cohen's changes in behavior were caused by the website, his conditions do not rise to the level of severity required by either Nevada or California law. Mr. Cohen's claims of distress fail under Nevada law without a showing of a physical manifestation, as claims of insomnia, sleep and appetite issues, nightmares, and irritability are not enough to show emotional distress in Nevada. Furthermore, Mr. Cohen's emotional state is not so severe that no reasonable man in civilized society should be expected to endure it. In fact, these same symptoms could be attributed to his position as head of an asset management company. (Exhibit O at 3) Accordingly, Cohen's emotional distress claim fails as a matter of law.

G. Plaintiffs Cannot Prevail on their Claim for Intentional Interference with Future Expected Business

Plaintiffs' claim for intentional interference with future expected business is more commonly known as a claim for intentional interference with prospective economic advantage or potential business advantage. Such a claim has five elements: 1) an economic relationship between the plaintiff and a third party with the probability of a future economic benefit to the plaintiff; 2) the defendant's knowledge of the relationship; 3) defendants' intentional acts to disrupt the relationship; 4) actual disruption of the relationship between plaintiff and a third party; and 5) economic harm to plaintiff proximately caused by the defendant's acts. *Wichinsky*, 109 Nev. at 87-88, 847; *Leavitt*, 103 Nev. at 88; *Westside Ctr.*, 42 Cal. App. 4th at 521-22. The interference Plaintiffs allege takes the form of Defendants' Internet statements and expressive activities on the Websites and is subject to the defenses afforded to allegedly defamatory speech.

1. Defendants Did Not Know of Any Specific Relationships Between Plaintiffs and Potential Investors to Disrupt

Defendants did not know of any specific entity or entities that Plaintiffs conducted business with or solicited business from. Rather than specifically contact any existing or potential business contact of Cohen's or CAM's, Defendants' published their concerns about Plaintiffs on the Websites, available on the Internet (Hansen Dep. at 35:14-36:1; Firebaugh Dep. at 73:13-24; 78:8-18; 87:4-88:11). Where there is no evidence that Defendants knew of specific business relationships their actions sought to disrupt, summary judgment in the defendants' favor is appropriate. *Williams v. Univ. Med. Ctr. of S. Nev.*, 688 F. Supp. 2d 1134, 1140 (D. Nev. 2010); *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215, 1220 (Cal. App. 2d Dist. 2006).

2. Plaintiffs' Claim is Based on Defendants' Expressive Activity, Which is Subject to the First Amendment's Protections

Even if Defendants knew of Plaintiffs' anticipated relationships with third parties and directed their communications to interfere with those potential contracts, Plaintiffs must show Defendants' conduct was improper. Nevada law requires Plaintiffs prove that Defendants' conduct "was unlawful, improper, or was not fair and reasonable." *Custom Teleconnect, Inc. v. Int'l Tele-Services, Inc.*, 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003). Lawful conduct may serve as a basis for intentional interference only when it is unjustified. *Cambridge Filter Corp. v. Int'l Filter Co.*, 548 F. Supp. 1301, 1306 (D. Nev. 1982), *citing Hambro v. Shell Oil Co.*, 674 F. 2d 784, 789 (9th Cir. 1982). A "strong showing" of intent is needed to establish liability. *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983). When this standard is not met, summary judgment for the defendant is appropriate. *Williams*, 688 F. Supp. 2d at 1140.

As set forth in this motion, Defendants' conduct is not unlawful, and is a Constitutionally protected exercise of their First Amendment rights. Defendants' statements were made to express their concerns about Plaintiffs based on their negative dealings with them (Hansen Dep. at 35:14-36:1). Because of Defendants' experience with Plaintiffs, they wished to educate and inform others about their concerns and struggles with Plaintiffs, and provide a "public service" by doing so (Hansen Dep. at 34:12-24). While Defendant Hansen felt strongly about the need to express his

feelings about Plaintiffs, he ultimately did so to relate his own subjective experiences and feelings about Plaintiffs, without seeking to interfere with any specific (and unknown) relationships Plaintiffs held (Hansen Dep. at 173:6-10).

3. Plaintiffs Have Not Identified Business Expectancies That Defendants Disrupted

Plaintiffs' business expectancies have not been affected by the Websites. Plaintiffs' evidence indicates that its alleged damages consist of the Ohio State Teachers not doing business with CAM, New York Life potentially not pursuing another deal with CAM, and Jeffrey Stern supposedly reducing his investment with CAM (Cohen Dep. at 114:8-15; Stern Dep. at 47:11-48:25, 50:10-15, 51:15-52:4, 52:9-53:17, 55:15-56:10). These are not concrete, reasonable expectancies that Defendants' conduct could have harmed. Plaintiffs' evidence must show that the potential relationship be close enough that it is "reasonably probable that the prospective advantage would have been realized but for the defendant's interference." *Youst v. Lango*, 43 Cal. 3d 64, 71 (Cal. 1987). Where the evidence only demonstrates that some third parties chose not to do business with Plaintiffs, judgment in Defendants' favor is proper. *Rickards v. Canine Eye Registration Found., Inc*., 704 F.2d 1449, 1456 (9th Cir. 1983).

Plaintiffs' beliefs about Ohio State Teachers and New York Life are wholly speculative (Cohen Dep. at 114:8-15). Stern's reduced investment with CAM is too vague and unspecified to be credible; the funds he invested were reduced by an amount Stern is uncertain of within several million dollars, and for reasons he declined to share (Stern Dep. at 47:11-48:25, 50:10-15, 51:15-52:4, 52:9-53:17, 55:15-56:10). No reasonable inference can be drawn from Stern's testimony that Defendants are at all implicated in his reduced investments. Failing to identify a potential contract or other relationship between Plaintiffs justifies entry of judgment for the Defendants. *Williams*, 688 F. Supp. 2d at 1140.

4. Plaintiffs' Damages for Intentional Interference are Speculative

Plaintiffs have not sufficiently produced evidence of harm arising from Defendants' allegedly improper conduct. Liability for improper interference arises "if, but only if, [plaintiff] establishes by proof the extent of the harm and the amount of money representing adequate

compensation." *Sunridge Builders, Inc. v. Old Blue, LLC*, Case No. 56335 *2013 WL 485831* (D. Nev. Feb. 6, 2013), citing Restatement (Second) of Torts § 912 (1979). To satisfy the requirement of damages, a plaintiff must produce evidence that the relationship "will eventually yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise." *KEMA, Inc. v. Koperwhats*, 658 F. Supp. 2d 1022, 1034 (N.D. Cal. 2009) (dismissing intentional interference claim), *citing Westside Ctr*., 49 Cal. Rptr. 2d 793 (Cal. 1996).

CAM has failed to meet this burden. Its supposed losses are unsubstantiated and without detail (Stern Dep. at 47:11-48:25, 50:10-15, 51:15-52:4, 52:9-53:17, 55:15-56:10). Its further claimed losses are based on relationships that either never came into being, such as the Ohio State Teachers, or which were consummated, but may or may not continue in the future, such as New York Life (Cohen Dep. at 114:8-15). Cohen's claims of damage are even more speculative. The only economic damages even suspected by Cohen related to a potential loss of business for CAM (Cohen Dep. at 114:8-15), rather than a direct lack of business opportunity for Cohen himself. This element of both Plaintiffs' intentional interference claims fail for remoteness.

H. Injunctive Relief Is A Remedy, Rather Than a Claim; Summary Judgment for Defendants Is Appropriate as to Injunctive Relief as a Cause of Action.

Defendants are entitled to judgment on Plaintiffs' fifth claim, for permanent injunction, which is properly styled as a request for relief rather than cause of action. "An injunction is an equitable remedy, not a cause of action." *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. Ct. App. 1999) (collecting citations for same). "A permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established." *Art Movers, Inc. v. Ni West*, 3 Cal. App. 4th 640, 646-47 (Cal. Ct. App. 1992); *Zepeda v. OneWest Bank FSB*, Case No. 5:CV 11-00777 *2011 WL 6182951* (N.D. Cal. Dec. 13, 2011). To the extent this fifth claim can be credited as a cause of action, judgment in Defendants' favor is appropriate.

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V. Conclusion

There is no genuine question as to the material facts showing that Plaintiffs cannot prove one or more elements of the claims they have asserted against Defendants. As such, none of Plaintiffs' claims may proceed. For the foregoing reasons, summary judgment on in Defendants' favor is appropriate.

Dated: October 30, 2013

Respectfully submitted,

/s/ Ronald D. Green

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by notice of electronic filing in the CM/ECF system for all parties and counsel of record.

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